upfront payments and reduced down payments for entrepreneurs should be adjusted. Upfront payment requirements are designed to ensure that only serious and qualified bidders participate in the Commission's spectrum auctions, and to deter frivolous or insincere bidding. Upfront payments are also required to provide the Commission with a source of funds in the event that it becomes necessary to assess default or bid withdrawal payments.[107] The Commission's rules currently require participants in the F block auction to submit an upfront payment of $0.015 per MHz per pop (or per bidding unit) for the maximum number of licenses (in terms of bidding units) on which they intend to bid.[108] This differs from the standard upfront payment formula originally set at $0.02 per MHz-pop for broadband PCS services, which was utilized in the A and B block auctions and will be required in the D and E blocks.[109] The 25 percent discount on the upfront payment for the entrepreneurs' block auctions was intended to facilitate the participation of capital-constrained companies and permit them to conserve resources for infrastructure development after winning a license.[110]

57. We request comment on whether a discounted upfront payment is necessary to encourage the participation of entrepreneurs and designated entities in the F block auction. We also request comment on whether the discounted upfront payment is sufficient to ensure that only serious and qualified bidders participate in the F block auction. Is the discounted upfront payment amount an adequate measure of a bidder's ability to pay for the licenses it might win and to meet the Commission's build-out requirements? Or, should the Commission increase the required upfront payment to $0.02 per bidding unit or more in order to minimize the possibility of insincere or frivolous bidding and bidder default?

58. Our F block rules also discount down payments for winning bidders. The primary purpose of the down payment requirement is to ensure that a winning bidder will be able to pay the full amount of its winning bid.[111] In arriving at an appropriate level for the down payment, the Commission sought to ensure that auction winners would have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system. At the same time, the Commission did not want to require a down payment so onerous as to hinder an applicant's growth and diminish its access to capital.[112] The Commission decided to require winning bidders in broadband PCS auctions (except for

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[107] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2378-79; *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5599.

[108] 47 C.F.R. § 24.711(a)(1).

[109] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2379; *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5560.

[110] *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5600.

[111] *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2381.

[112] *Id.*

those eligible for installment payments in the entrepreneurs' blocks) to supplement their upfront payment with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).[113] For winning bidders in the entrepreneurs' blocks auctions, the Commission agreed to require a reduced down payment of only ten percent of the winning bid.[114] Currently, a winning bidder in the F block auction is required to make a down payment equal to ten percent of its net winning bid, with five percent due within five days of the close of the auction, and the remainder due within five days of the grant of the license.[115]

59. We now request comment on whether this reduction in the down payment requirement is necessary to facilitate the participation of entrepreneurs and designated entities in providing service to the public as F block licensees. We also request comment on whether the reduced down payment is sufficient to demonstrate that a winning bidder has the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system. Should the Commission increase the required down payment to 20 percent of the winning bid in order to guard against the possibility of bidder default? Would a higher payment hinder growth and access to capital?

5. Rules Regarding the Holding of Licenses

60. Background. In the *Competitive Bidding Fifth Report and Order,* we adopted restrictions on the transfer or assignment of licenses won by bidders in the entrepreneurs' blocks.[116] These restrictions were designed to ensure that licensees did not take unfair advantage of entrepreneurs' block special provisions by immediately assigning or transferring control of their licenses to other entities. We indicated that "trafficking" of licenses in this manner would unjustly enrich the auction winners and would undermine the congressional objective of giving designated entities the opportunity to provide spectrum-based services. Our rules prohibit licensees in the entrepreneurs' block from voluntarily assigning or transferring control of their license during the three years after the date of the license grant.[117] Two years thereafter, the licensee is permitted to assign or transfer control of its authorization only to an entity that satisfies the eligibility criteria for the entrepreneurs' blocks.[118]

61. In the *Competitive Bidding Fifth Report and Order*, we also adopted specific rules to prevent recipients of bidding credits and installment payment plans from realizing any

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[113] *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5563.

[114] *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5593.

[115] *See* 47 C.F.R § 24.716(a)(2).

[116] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5588.

[117] 47 C.F.R. § 24.839(d)(2).

[118] *Id.*

unjust enrichment that they might gain from transfer or assignment that occurs during the full ten-year license term.[119] With regard to bidding credits, our rules require that if a licensee applies to assign or transfer control of a license to an entity that is not eligible for as high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid to the U.S. Treasury as a condition of approval of the transfer or assignment.[120] If a licensee that was awarded installment payments seeks to assign or transfer control of its license during the term of the license to an entity not meeting the applicable eligibility standards, our rules require payment of the remaining principal and any interest accrued through the date of assignment as a condition of approval of the transfer or assignment.[121]

62. Discussion. In addition to the changes that we propose to the F block auction rules, we tentatively conclude that some measure is still needed to discourage speculators or sham bidders in the entrepreneurs' block auction. We also tentatively conclude that if we adopt our proposals to make the F block auction rules race- and gender-neutral, and extend small business provisions to bidders in all three 10 MHz broadband PCS blocks, our current transfer restrictions for F block licensees may be too restrictive. For example, under our proposed changes to the race- and gender-based provisions and the current transfer restriction, a small business cannot transfer its F block license in the first three years and, in the two years thereafter, may only transfer its license to another small business. An entrepreneur F block licensee, however, would be able to transfer its F block license in years four and five to any other entrepreneur, including a small business. Such a result goes farther than to merely discourage speculative bidding in the entrepreneurs' block auction. Therefore, we propose to amend the holding requirement to let all F block licensees transfer their licenses within the first three years to an entity that qualifies as an entrepreneur. We also propose to retain our unjust enrichment provisions. We seek comment on this proposal and our tentative conclusions. We particularly seek comment on whether entities participating in the C block auction may have had experiences that would influence our tentative conclusions here.

B. The *Cincinnati Bell* Remand

63. As noted above, in *Cincinnati Bell* the Sixth Circuit held that our cellular/PCS cross-ownership rule and 20 percent attribution rule are arbitrary, and it remanded these issues to the Commission for further proceedings.

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[119] *Competitive Bidding Fifth Report and Order,* 9 FCC Rcd at 5591, 5594.

[120] 47 C.F.R. § 24.712(d).

[121] 47 C.F.R. § 24.711(e).

1. The Cellular/PCS Cross-ownership Rule

64. Background. Under Section 24.204(a), no cellular licensee may be granted a license for more than 10 MHz of broadband PCS spectrum prior to the year 2000 if the grant will result in a significant overlap of the cellular licensee's Cellular Geographic Service Area ("CGSA") and the PCS service area. After the year 2000, cellular licensees will be allowed to obtain a grant of 15 MHz of PCS spectrum in an area that overlaps significantly with their CGSA.[122] "Significant overlap" occurs when ten percent or more of the population of the PCS service area is contained within the CGSA.[123] Thus, because cellular licenses authorize the use of 25 MHz of spectrum, cellular operators currently are limited to 35 MHz of aggregated cellular and PCS spectrum in any one geographic area.

65. In *Cincinnati Bell*, the Court concluded that the Commission's limitations on cellular operators' eligibility for PCS licenses are arbitrary because the FCC provided little or no support for its assertions that, without such restrictions, cellular providers might engage in anticompetitive practices or exert undue market power.[124] The Court further explained that, while the Commission's stated goal of avoiding excessive concentration of licenses is a permissible objective under the Communications Act, our cellular eligibility rules are, without an economic rationale, an arbitrary solution to this problem.[125] According to the Court, the FCC must supply more factual support for its belief that cellular operators might detrimentally affect the market if they were allowed to obtain licenses for larger amounts of PCS spectrum.[126]

66. Discussion. In light of the Sixth Circuit's ruling, we seek comment on whether our PCS/cellular cross-ownership rule should be relaxed or retained. Currently, the Commission's rules contain other spectrum caps that affect applicants for PCS licenses. The broadest limitation on wireless spectrum ownership is the 45 MHz cap on CMRS uses within three radio services: broadband PCS, cellular, and SMR.[127] In addition, all PCS licensees are

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[122] 47 C.F.R. § 24.204(b).

[123] 47 C.F.R. § 24.204(c).

[124] *Cincinnati Bell*, 69 F.3d at 762-63.

[125] *Id.* at 764.

[126] The Court rejected arguments that the Commission exceeded its statutory authority in adopting the cellular/PCS cross-ownership provisions of Section 24.204 of the Commission's Rules. *Cincinnati Bell*, 69 F.3d at 761-62. The Court also rejected the claim that the restrictions on cellular ownership unfairly discriminate against cellular providers because the cross-ownership restrictions do not apply to SMR or Mobile Satellite Service providers, holding that the differences in technology and service provided by cellular and these services justify the adoption of different rules. *Id.* at 765.

[127] 47 C.F.R. § 20.6(a).

limited to a total of 40 MHz of spectrum in any one geographic area.[128] This means that an entity may not own PCS licenses for any two or more spectrum blocks that will total more than 40 MHz in the same geographic area.[129] Are there reasons for maintaining the separate 35 MHz spectrum cap on cellular providers' ownership of PCS spectrum in their service area or the 40 MHz PCS spectrum cap? Comments supporting retention of the current rules should provide facts showing that cellular operators will detrimentally affect the market if allowed to obtain immediately more than 10 MHz of PCS spectrum in their geographic service areas. We also seek comment on whether we should relax and simplify our ownership limitations by eliminating our PCS/cellular ownership limitations and our 40 MHz PCS spectrum cap in favor of the single 45 MHz CMRS spectrum cap. Under such a rule, cellular operators would be permitted to acquire licenses for two 10 MHz blocks of broadband PCS spectrum. We ask commenters to discuss the impact on competition among CMRS providers, including the effect, if any, on the provision of PCS.

2. The 20 Percent Attribution Standard

67. Background. For the purpose of determining whether an entity is a cellular operator and subject to the cellular/PCS cross-ownership rule, we have developed attribution standards. Section 24.204(d)(2)(ii) of the Commission's Rules, 47 C.F.R. § 24.204(d)(2)(ii), provides that partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee will be attributable. Thus, any entity owning a 20 percent interest in a cellular licensee is precluded from obtaining a license for broadband PCS in excess of 10 MHz in a service area that overlaps the cellular licensee's CGSA.

68. Section 24.204(d)(2)(ii) also currently provides for a higher cellular ownership attribution threshold for small businesses, rural telephone companies, and businesses owned by minorities or women than for other entities. If cellular ownership interests are held by such types of businesses, their interests are not attributable until they reach at least 40 percent. Similarly, a cellular ownership interest held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant owned by minorities or women is attributable only if it reaches 40 percent or more.

69. The Court in *Cincinnati Bell* found our 20 percent cellular attribution standard to be arbitrary on the ground that it does not bear a reasonable relationship to whether a party with a minority interest in a cellular licensee actually has the ability to control that licensee.[130]

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[128] 47 C.F.R. § 24.229(c).

[129] 47 C.F.R. § 24.229(d) allows PCS licensees that have met the 5-year construction requirement to assign portions of their PCS spectrum. In no case, however, can assignees aggregate more than 40 MHz of PCS and cellular spectrum.

[130] *Cincinnati Bell*, 69 F.3d at 759-61.

The Court rejected the FCC's argument that an entity with such an interest in a cellular licensee would have a reduced incentive to compete with the cellular company as a PCS provider, indicating that this argument is unsupported by either statistical data or a general economic theory and stating that the Commission must provide support for such predictive conclusions.[131] In response to the FCC's argument that the Commission needs a bright-line rule to avoid delays in resolving PCS eligibility issues, the Court agreed with those challenging the 20 percent standard that the Commission should have supplied a reasoned basis for its decision not to adopt less restrictive alternatives.[132]

70. Our 45 MHz CMRS spectrum aggregation limit, discussed above, includes an attribution rule that governs how ownership interests are measured. Under this rule, partnership and other ownership interests, and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular, or SMR licensee shall be attributed, except that those interests held by small businesses, rural telephone companies, or businesses owned by minorities or women will not be attributed unless they reach a threshold level of 40 percent. Similarly, a CMRS ownership interest held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant owned by minorities or women is attributable only if it reaches 40 percent or more.[133] The Commission's 20 percent attribution level for the CMRS spectrum cap was chosen to be consistent with the attribution standard for the PCS/cellular cross-ownership rule.[134] The Commission supported this standard with an opinion of the Federal Accounting Standards Board ("FASB") which explicitly states that ownership interests below 20 percent presumptively do not have control and above 20 percent they do unless evidence to the contrary is established.[135]

71. In the *Competitive Bidding Sixth Report and Order*, our cellular/PCS cross-ownership attribution rule and our CMRS spectrum aggregation rules were amended for purposes of C block licenses to eliminate race- and gender-based provisions and make the 40 percent attribution standard applicable only to interests held by a small business or rural telephone company and interests held by an entity with a non-controlling equity interest in a licensee or applicant that is a small business.

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[131] *Id.* at 760.

[132] The Court discussed, for example, the attribution rule adopted for the C block auction, under which minority- and women-owned businesses were made eligible to bid as long as the businesses maintain ownership of at least 50.1 percent of the equity and 50.1 percent of the voting interests. *Cincinnati Bell*, 69 F.3d at 760.

[133] 47 C.F.R. § 20.6(d)(2).

[134] Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988, 8114 (1994) (*"CMRS Third Report and Order"*).

[135] *Id.* (citing FASB Accounting Principles Board Opinion No. 18 (1970)).

72. Discussion. We seek comment on whether we should retain our ownership attribution rule for cellular licensees interested in acquiring broadband PCS licenses. Our 20 percent attribution rule was fashioned to strike a balance between maximizing competition and allowing cellular entities to bring their expertise to PCS.[136] We did not adopt a rule that required inquiry into whether a party has a controlling interest in a cellular licensee because we believed a bright-line rule would result in faster, less burdensome licensing. However, the Sixth Circuit found that we did not adequately justify this decision.[137] Accordingly, we also seek comment on whether our 20 percent attribution rule should be modified. Should our attribution rule be changed to a controlling interest test? Is there some other bright-line test that might be used to avoid burdening the licensing process? Should we adopt a single majority shareholder exception? Should our approach depend on whether we modify our cellular/PCS cross-ownership rule or, in the alternative, eliminate this rule and retain only our 45 MHz CMRS spectrum cap? Should we, in any case, modify the 20 percent attribution standard applicable to the 45 MHz CMRS spectrum cap in light of the Sixth Circuit's opinion regarding this type of standard in connection with our cellular/PCS cross-ownership rule? We note that the 20 percent attribution standard and the 40 percent exception are the highest ownership attribution rules the Commission has.[138] The new Telecommunications Act, in the definition of "affiliate," defines ownership as a 10 percent interest.[139]

73. We propose to modify the cellular/PCS cross-ownership and CMRS spectrum aggregation limit rules for F block purposes to comply with the requirements of *Adarand*. We propose to remove the provisions in these rules which increase the cellular attribution threshold to 40 percent on the basis of the race or gender of the holder of the ownership interest or of the broadband PCS applicant in which such holder is an investor. Accordingly, we propose, for purposes of the F block auction, that the 40 percent cellular attribution threshold of the PCS/cellular cross-ownership rule will continue to apply if the ownership interest is held by a small business or a rural telephone company or if the cellular ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a small business. Similarly, we propose, for purposes of the F block auction, that the 40 percent cellular attribution threshold of the CMRS spectrum aggregation limit will continue to apply if the CMRS ownership interest is held by a small business or a rural telephone company (including those owned by minorities or women). These proposed changes mirror modifications that we made to the C block rules in the *Competitive Bidding Sixth Report and Order*. We seek comment on this proposal.

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[136] Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, GN Docket 90-314, 9 FCC Rcd 4957, 5003 (1994) ("*PCS Memorandum Opinion and Order*").

[137] *Cincinnati Bell,*69 F.3d at 760.

[138] Compare 47 C.F.R. § 73.3555

[139] Pub. L. No. 104-104, Section 3(a)(2)(33), 110 Stat. 56 (1996).

74. Finally, we note that the Court in *Cincinnati Bell* did not find Section 24.204(d)(2)(i) of the Commission's Rules to be arbitrary. Under this section, certain ownership interests of five percent or more in broadband PCS licensees and applicants are attributable for purposes of applying the 10 and 15 MHz spectrum limitations and the 40 MHz limit in the same geographic area, discussed above.[140] We do not propose to modify this rule.

C. Ownership Disclosure Provisions

75. Background. Our rules provide "short-form" (FCC Form 175) and "long-form" (FCC Form 600) application procedures for broadband PCS bidders. Short-form applications are submitted prior to the auction by entities seeking to qualify as bidders. Long-form applications are submitted by winning bidders in the auctions to obtain their licenses. Our application procedures for broadband PCS require applicants to furnish detailed ownership information in both their short-form and long-form applications.[141] This information includes:

a. A list of any business, five percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder, or key management personnel of the applicant (including a description of each such business' principal business and relationship to the applicant);

b. A list of any party that holds a five percent or more interest (or ten percent interest or more for institutional investors[142]), in the applicant or any entity in which a five percent or more interest (or ten percent or more interest for institutional investors) is held by another party which holds a five percent or more interest (or ten percent or more interest for institutional investors) in the applicant;

c. A list of the names, addresses, citizenship, and principal business of any person holding five percent or more of each class of stock, warrants, options, or debt securities, together with the amount and percentage held and the name, address, citizenship and principal place of business of any person, on whose account (if other than the holder) such interest is held;

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[140] 47 C.F.R. § 24.204(a), 24.204(b), 24.229(c).

[141] 47 C.F.R. § 24.813.

[142] Section 24.720(h) of the Commission's Rules defines institutional investors as "an insurance company, a bank holding stock in trust accounts through its trust department, or an investment company as defined in 15 U.S.C. 80a-3(a), including within such definition any entity that would otherwise meet the definition of investment company under 15 U.S.C. § 80a-3(a) but is excluded by the exemptions set forth in 15 U.S.C. 80a-3(b) and (c), without regard to whether such entity is an issuer of securities; provided that, if such investment company is owned, in whole or in part, by other entities, such investment company, such other entities and the *affiliates* of such other entities, taken as a whole, must be primarily engaged in the business of investing, reinvesting or trading in securities or in distributing or providing investment management services for securities." 47 C.F.R. § 24.720(h).

d. If the applicant is a partnership, each partner's name, citizenship and the share or interest participation in the partnership, and a signed and dated copy of the partnership agreement. A signed and dated copy of the partnership agreement must be included in the application.

76. In addition to this information required of all PCS applicants, specific rules require F block applicants to submit more detailed ownership and financial information. An F block applicant that is a publicly traded corporation with widely distributed voting power must include with its short-form application a certified statement that it complies with the definition of a publicly traded corporation in Section 24.720(m) of our rules. It must also identify its affiliates and provide its gross revenues and total assets.[143] On their short-form applications, all other F block applicants must disclose: (1) the identity of each member of their control group, including the citizenship and gender or minority group classification for each member; (2) the status of each control group member that is an institutional investor and existing investor and/or a member of the applicant's management; (3) the identity of each affiliate of the applicant and each affiliate of individuals in applicant's control group; (4) their gross revenues and total assets.[144] Applicants must demonstrate their gross revenues and total assets using audited financial statements for the most recently completed calendar or fiscal years.[145] Each F block applicant must also certify on its short-form application that it is eligible to bid for and obtain licenses, consistent with the Commission's Rules and, if appropriate, that it is eligible to bid as a designated entity.[146]

77. Winning F block bidders' long-form applications must disclose, separately and in the aggregate, their gross revenues and total assets plus the gross revenues and total assets of their affiliates, their control group members, their attributable investors, and affiliates of their attributable investors.[147] These applicants must also list and summarize all agreements that support their eligibility for an F block license and any investor protection agreements.[148]

78. During the course of previous broadband PCS auctions, it became evident that certain ownership disclosure requirements found in our general PCS competitive bidding rules were burdensome and difficult to administer both at the short-form and long-form stages. For

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[143] 47 C.F.R. § 24.715(c)(1)(i).

[144] 47 C.F.R. § 24.715(c)(1)(ii). For applicants claiming small business consortium status, this information must be provided for each member of the consortium. *See* 47 C.F.R. § 24.715(c)(1)(iii).

[145] 47 C.F.R. § 24.720(f); *See also Competitive Bidding Fifth Memorandum Opinion and Order*, 9 FCC Rcd at 419, 487.

[146] 47 C.F.R. § 24.715(c)(1).

[147] 47 C.F.R. § 24.715(c)(2).

[148] *Id.*

many large corporations, especially investment firms with diverse holdings, the requirements were very burdensome, particularly when they involved calculating indirect ownership interests in outside firms using the multiplier. Moreover, while identifying all businesses in which an attributable stockholder of the applicant held a five percent (or greater) interest generated significant amounts of information, the disclosures identified businesses that had no relation to the services for which licenses were being auctioned. In addition, requiring the submission of partnership agreements proved sensitive because such agreements often contained strategic bidding information and other confidential data. These provisions were waived by the Wireless Telecommunications Bureau for the short-form and long-form filings for PCS blocks A and B and for the short-form application for the C block.[149]

79. In waiving ownership disclosure requirements for the A and B block short-form applications, the Wireless Telecommunications Bureau stated that the purpose of the disclosure rules contained in Section 24.813(a) of the Commission's Rules is "to allow the Commission to determine who is the real party in interest, to determine compliance with anti-collusion rules and ownership restrictions such as the multiple- and cross-ownership rules and the alien ownership restrictions."[150] The Bureau noted that the short-form application requires applicants to certify that they are in compliance with these regulations. The Wireless Telecommunications Bureau concluded that requiring information about all attributable stockholders' other interests does not serve the stated purposes of ownership disclosure. The Bureau also concluded that because partnership agreements often discuss strategic business objectives, submission of them would be detrimental to partnerships.[151] Following the same rationale, the Wireless Telecommunications Bureau waived Section 24.813(a)(1), 24.813(a)(2) and 24.813(a)(4) of the rules for the A and B block long-form and the C block short-form applications.

80. At the short-form application stage in the C block PCS auction, we received 36 waiver petitions from applicants requesting that they be permitted to demonstrate their gross revenues and total assets using methods other than audited financial statements.[152] These waiver requests indicate that many smaller businesses do not use audited financial statements in the normal course of business. Applicants in the C block auction also requested, and were granted, a waiver of the requirement that when financial information is supported by audited financial statements based on fiscal years, statements for the three most recent years must be

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[149] Waiver of Section 24.813 of the Commission's Rules, PP Docket 93-253, 9 FCC Rcd 6392 (Wireless Tel. Bur. 1994); Waiver of Certain Provisions of Section 24.813 of the Commission's Rules, PP Docket 93-253, DA 95-507 (Wireless Tel. Bur. March 22, 1995); and Waiver of Section 24.813 of the Commission's Rules, PP Docket 93-253, DA 95-1130 (Wireless Tel. Bur. May 19, 1995).

[150] 9 FCC Rcd at 6392.

[151] *Id.* at 6393.

[152] To date, none of these waiver requests have been resolved.

used.[153] Applicants were permitted to file statements for fiscal years 1991, 1992, and 1993, instead.

81. Discussion. In light of our experience to date, we propose to amend Section 24.813(a)(1) and Section 24.813(a)(2) of our rules to limit the information disclosure requirement with respect to outside ownership interests of applicants' attributable stockholders. More specifically, we propose to require only the disclosure of attributable stockholders' direct, attributable ownership in other businesses holding or applying for CMRS or Private Mobile Radio Services ("PMRS") licenses. Moreover, we propose to amend Section 24.813(a)(4) to delete the requirement that partnerships file a signed and dated copy of the partnership agreement with their short-form and long-form applications. We request comments on these proposed changes. We also seek comment on whether we should further reduce the scope of information required by our general PCS rules at either the short-form or long-form filing stages. In addition, we request comment on the alternative approach of requiring applicants to make their ownership documentation available upon request during or after the auction. We also request comment on whether our proposed changes would provide bidders with sufficient information on their competitors in the auction.

82. The number of waiver requests asking for permission to demonstrate gross revenues and total assets without audited financial statements in the C block auction leads us to propose changes to Section 24.720(f) and Section 24.720(g) of the Commission's Rules. We propose to permit each applicant that does not otherwise use audited financial statements to provide a certification from its chief financial officer that the gross revenue and total asset figures that it provides in its short-form and long-form applications are true, full, and accurate; and that the applicant does not have the audited financial statements that are otherwise required under our rules. We believe that such a modification to our rules would be the most effective way to amend our rules so that small businesses are not overly burdened by auditing their finances when they would not otherwise do so. We seek comment on this proposal. We also ask interested parties to suggest other alternatives to the audited financial statement requirement, and we seek comment on whether an alternative -- the one we propose or any other -- should be available to all F block applicants (or D and E block applicants if small business provisions are extended to these blocks), or only to applicants that do not otherwise use audited financial statements. We also request comment on whether applicants should continue to be allowed to rely on either fiscal years or calendar years in providing their gross revenues. Should they instead be required to base their size calculations on the most recent four quarters so that the Commission receives the most current information available?

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[153] *In the Matter of B&P PCS, Inc. and R&S PCS, Inc. Request for Waiver of Section 24.720(f) of the Commission's Broadband PCS Rules, Order*, 10 FCC Rcd 9870 (Wireless Tel. Bur. 1995).

D. Auction Schedule

83. Background. While our rules do not establish a specific schedule for awarding the D, E, and F block broadband PCS licenses by competitive bidding, our reasons for creating these 10 MHz licenses and the communications industry's plans for using them directly affect when they should be auctioned. When we established the band plan for broadband PCS, we stated that we believed that 10 MHz blocks, both on their own and in combination with the 30 MHz blocks or with each other, could support a variety of PCS services.[154] At that time, parties indicated that 10 MHz blocks would be suitable for providing services ranging from specialized or "niche" applications to services comparable to those now provided by cellular systems.[155] We recognized that 10 MHz licenses also would be beneficial to cellular operators, who have limited eligibility for PCS participation in region,[156] and might also augment SMR.[157] We, therefore, created the 10 MHz licenses to promote the provision of services that might not require a full 30 MHz of spectrum, or for aggregation with a 30 MHz PCS license or an existing cellular license.[158]

84. On December 23, 1994, the Commission sought comment on whether to auction the 10 MHz F block licenses together with the other 10 MHz D and E block licenses.[159] Of the six comments received, the majority favored a single auction for all three blocks.[160] Arguments in favor of a single auction included efficiency advantages for bidders, administrative and cost savings, and an equal timeline for start-up and deployment of all 10 MHz licensees.[161] Commenters also noted a substantial need in broadband PCS for licensees to aggregate spectrum up to the limits set by the Commission[162] and observed that a single

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[154] *PCS Memorandum Opinion and Order*, 9 FCC Rcd at 4981.

[155] *Id.*

[156] *See* 47 C.F.R. § 24.204(a).

[157] *PCS Memorandum Opinion and Order*, 9 FCC Rcd at 4981.

[158] *Id.* at 4971.

[159] News Release, FCC Announces Date For First Entrepreneurs' Block Auction, December 23, 1994.

[160] *See, e.g.,* Comments of Brian C. Newman, filed January 10, 1995; Comments of Opportunities Now Enterprises (O.N.E.), Inc., filed January 23, 1995; Comments of Calcell, Inc., filed January 25, 1995; Comments of BellSouth Corporation, BellSouth Wireless, Inc., and BellSouth Personal Communications, Inc., filed January 25, 1995.

[161] *See, e.g.,* Comments of O.N.E., filed January 23, 1995.

[162] Comments of Calcell, Inc., filed January 25, 1995.

auction would allow bidders to obtain 20 MHz licenses to meet unique service needs.[163] Arguments opposing a single
auction were that separate auctions would expedite auction administration and promote opportunities for designated entities by awarding them the first 10 MHz licenses.[164]

85. Discussion. We tentatively conclude that we should auction the D, E, and F frequency blocks concurrently in simultaneous multiple round auctions. The comments in response to our initial inquiry into this issue indicate that simultaneous access to all the 10 MHz licenses is important to the plans of some prospective PCS providers, and we find their arguments persuasive. We seek comment on this tentative conclusion. We also seek comment on specific services that are planned for the D, E, and F licenses and how, if at all, auctioning all the licenses simultaneously would affect those planned services. We are also interested in other factors that commenters believe would justify combining the auction of the D, E, and F block licenses, or that would argue against doing so.

86. If we auction the D, E, and F blocks concurrently, we also seek comment on the option of auctioning the D and E licenses together in one auction and the F block licenses in a separate auction. This approach would accommodate the difference in eligibility requirements for the F block auction. We seek comment on whether we should adopt this approach. We also request comment on whether our auction rules for these three blocks should be modified in any way if we implement this proposal.

V. Conclusion

87. With this Notice, we seek to resolve a number of issues relevant to the award of licenses for the broadband PCS D, E, and F blocks. Balancing our obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against our duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, we begin here the process of supplementing the record supporting our gender- and race-based rules in the wake of *Adarand.* However, we also tentatively conclude that we should not delay auctioning the remaining broadband PCS frequency blocks long enough to complete that process. In keeping with this tentative conclusion, we propose to modify our F block rules to make them gender- and race-neutral. We also seek comment on several other matters relating to designated entities and entrepreneurs, including our definitions of small business and rural telephone company, the possible extension of installment payment plans to small businesses bidding on the D and E blocks, adjustments to the benefits provided to entrepreneurs in the F block rules that might be warranted in light of the fact that 10 MHz licenses are expected to have lower values than the 30 MHz C block licenses, and possible changes to our F block license transfer

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[163] Comments of Brain C. Newman, filed January 10, 1995.

[164] Comments of PCS Primeco, L.P., filed January 25, 1995.

restrictions.

88. We also seek to resolve the question of whether, in light of *Cincinnati Bell,* we should retain or modify our cellular/PCS cross-ownership rule and our attribution rules for cellular licensees interested in acquiring broadband PCS licenses. In addition, we reexamine our ownership information disclosure requirements for broadband PCS applicants, and propose to auction the D, E, and F block licenses in concurrent auctions. We seek comment on all of the tentative conclusions and proposals presented herein.

VI. Procedural Matters

A. Regulatory Flexibility Act

89. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

B. Ex Parte Rules -- Non-Restricted Proceeding

90. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

C. Initial Paperwork Reduction Act of 1995 Analysis

91. This Notice contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collections contained in this Notice, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this Notice; OMB comments are due 60 days from the date of publication of this Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of

the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Dates

92. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **April 15, 1996** and reply comments on or before **April 25, 1996**. To file formally in this proceeding you must file an original and four copies of all comments and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send your comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

93. Written comments by the public on the proposed and/or modified information collections are due on or before April 15, 1996. Written comments must be submitted by the Office of Management and Budget on the proposed and/or modified information collections on or before 60 days after the date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

E. Contact Person

94. For further information concerning this proceeding, contact Mark Bollinger at 418-0660 (Auctions Division, Wireless Telecommunications Bureau).

VII. ORDERING CLAUSES

95. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 4(j), 7, 303(r), 308(b), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, 303(r), 308(b), and 309(j), NOTICE IS HEREBY GIVEN of the proposed amendments to Parts 20 and 24 of the Commission's Rules, 47 C.F.R. Parts 20 and 24, in accordance with the proposals in this Notice of Proposed Rule Making, and that COMMENT IS SOUGHT regarding such proposals.

96. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A
Initial Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this Notice of Proposed Rule Making. Written public comments are requested on the IRFA.

1. Reason for Action

This rule making proceeding is initiated to obtain comment on proposals to modify the competitive bidding rules for the D, E, and F frequency blocks of broadband Personal Communications Services (PCS). This rule making proceeding is also initiated to request comment on modification of the PCS/cellular cross-ownership rule and related attribution rules in light of a remand of those rules in *Cincinnati Bell Telephone Co. v. FCC.*

2. Objectives

The Commission seeks to resolve issues relevant to the award of licenses for the broadband PCS D, E, and F frequency blocks. This Notice initiates the process of supplementing the record supporting the gender- and race-based competitive bidding rules in the wake of *Adarand Constructors, Inc. v. Peña.* However, the Commission tentatively concludes that it should not delay auctioning the remaining broadband PCS blocks long enough to complete that process and proposes to change the F block auction rules to make them gender- and race-neutral. The Commission also seeks comment on several other matters relating to designated entities and entrepreneurs, including the definitions of small business and rural telephone company, the possible extension of installment payment plans to small businesses bidding on the D and E blocks, adjustments to the benefits provided to entrepreneurs in the F block rules that might be warranted in light of the fact that 10 MHz licenses are expected to have lower values than the 30 MHz C block licenses, and possible changes to the F block license transfer restrictions.

The Commission also seeks to resolve whether, in light of *Cincinnati Bell,* it should relax or retain the PCS/cellular cross-ownership rule and the attribution rules for cellular licensees interested in acquiring broadband PCS licenses. In addition, the Notice proposes to amend the ownership information disclosure requirements for broadband PCS auction applicants, and proposes to auction the D, E, and F block licenses in concurrent auctions.

C. Legal Basis

The proposed action is authorized under Sections 1, 4(i), 4(j), 7, 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, 303(r) and 309(j).

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposals under consideration in this Notice do not include the possibility of new reporting and recordkeeping requirements for small business entities.

E. Federal Rules that Overlap, Duplicate or Conflict with These Requirements

None.

F. Description, Potential Impact and Number of Small Entities Involved

The rule changes proposed in this Notice will affect all small businesses regardless of whether each small business avails itself of the favorable rule changes.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives

This Notice proposes certain mechanisms of preferential treatment for small businesses, among other entities, to ensure economic opportunity, such as favorable financing and bidding credits.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: In the Matter of Amendment of Part 24 of the Commission's Rules-- Broadband PCS; Amendment of the Commission's Cellular PCS Cross-Ownership Rule.

The Commission has adopted a Notice of Proposed Rulemaking ("NPRM") to reexamine whether, in light of Adarand[1], the Commission's auction rules for the broadband personal communications services ("PCS") F block auction should be modified so as to be race and gender neutral. I write separately to express my concern that the Commission has failed to take affirmative steps to develop a record necessary to meet the standard of review for minority provisions under the Adarand decision until this time.

In July 1995, the Commission was faced with a similar task of reexamination and modification of the broadband PCS C block auction rules.[2] At that time, the Commission indicated that it was taking expedited action to address the issues concerning race and gender based provisions in its auction rules raised by the Adarand decision. As justification for modification of these rules pursuant to the Sixth Report and Order, we reasoned that there was insufficient time to develop a record that would allow the Commission to support the use of race or gender based provisions for the C block auction. We reasoned further that any delay in the auction caused by potential judicial challenge of our C block auction rules would significantly hamper the opportunity for small businesses and businesses owned by minorities and women to effectively compete in the PCS marketplace.

The Commission has stated its intention to initiate a rulemaking for a statutorily mandated report to Congress on the participation of small businesses in the auctions and in the provision of spectrum-based services and market barriers to entry for small businesses.[3] Though I am pleased that this task is scheduled to be undertaken in short order, I am displeased that it has taken the Commission nearly one year and the adoption of numerous auction rules for various spectrum-based services to initiate such a rulemaking. That having been said, as the Commission proceeds with this rulemaking, I remind the Commission that it has an obligation,

[1]See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) ("Adarand").

[2]Implementation of Section 309(j) of the Communications Act-Competitive Bidding, *Sixth Report and Order*, PP Docket 93-253, 60 FR 37786 (July 21, 1995) ("Sixth Report and Order").

[3]See 47 U.S.C. § 309(j)(12)(D).

pursuant to Section 309(j) of the Communications Act,[4] to ensure that minority and women-owned businesses, and not just minority and women-owned small businesses are ensured the opportunity to participate in the provision of these services. To that end, I hope that the record developed pursuant to the proposed rulemaking, will seek to address these more general concerns about minority and female participation in the telecommunications arena as well.

Finally, I am concerned that the Commission, in its effort to proceed quickly with the F block auction, bear in mind that it took time for many minority and women bidders in the C block auction to acquire financing for implementation of their PCS business plans. Indeed, our auction rules contemplated that acquisition of capital would take time for certain entities. As such, while some potential bidders have encouraged the Commission to proceed expeditiously to auction for F block licenses, I believe that we must remain cognizant of and allocate sufficient time for potential bidders to obtain capital for their PCS ventures.

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[4] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(a), 107 Stat. 312, 388 (1993) authorizing the competitive bidding of spectrum-based services and mandating that small businesses, rural telephone companies and businesses owned by members of minority groups and women ("designated entities") are ensured that opportunity to participate in the provision of such services.